IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1928.

No. 455.

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

VS.

EDWARD H. JOHNSON, RESPONDENT.

No. 456.

NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

VS.

MYRTLE J. JOHNSON, RESPONDENT.

BRIEF OF RESPONDENTS IN OPPOSITION TO ISSUANCE OF WRITS OF CERTIORARI.

STATEMENT OF CASE.

These are passenger-carrier *res ipsa loquitur* cases. Plaintiffs had judgments in the trial court; the defendant did not make a motion for a new trial; did not

give the trial court an opportunity to pass upon alleged errors, but sued out writs of error, under which the amount of the verdicts could not be questioned.

The Circuit Court of Appeals for the Eighth Circuit on July 2d, last, affirmed the judgments.

Under Rule 28 of the Circuit Court of Appeals, the defendant had sixty days in which to move for a rehearing. The defendant declined to make such a motion, and thus deprived that court of an opportunity to correct any alleged errors.

STATEMENT OF FACTS.

Myrtle Johnson, thirty-two years of age, weighing 160 pounds (R. 94), strong, athletic, in perfect health (R. 361, 329, 290), was a passenger on one of defendant's trains; she stood in the aisle of a Pullman car, holding onto the curtains and the partition between two berths, bracing herself against the ordinary sway of the car (R. 108, 274, 275, 276, 277, 305); her sister-in-law, Imogene Johnson, was seated on the edge of the berth with her back braced against the arm of the seat and her foot braced in the aisle (R. 142, 144) to protect herself against any ordinary sway or lurch of the car; they had placed a suit case on the berth in order to get out their night clothes (R. 108); then there came "the most extraordinary jerk, jolt, lurch and lunge that I have ever experienced" (R. 112). The sudden lurch swung Myrtle around and tore her grasp from the partition and the curtains and crashed the left side of her head against the upper berth "with such force it knocked my head down on my shoulders and then it threw me with such force that it finally threw me to the floor" (R. 276-7) across the aisle to the head of the opposite berth. Imogene, weighing 160 pounds, and who had braced herself, as aforesaid, was catapulted over the suit case and diagonally across the berth to the rear end with her hand clutching the rear sill; the lunge and lurch of the train was so great as to cause a lesion of Myrtle's brain and her entire right side was permanently paralyzed.

The conductor being notified of the accident and injuries wired ahead to Chicago for a doctor. Myrtle and Immogene were experienced travelers (R. 315, 111) and each testified that "this was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced" (R. 112, 275).

The defendant's counsel in his argument to the jury said:

> "But all of a sudden there was a check of the car and it pitched her forward * * * the tendency is just like the cracking of a whip."

Defendant's counsel after commenting upon the fact that the plaintiff produced twenty-one witnesses to testify to the "condition of this poor woman" (R. 427) said:

> "You don't need those witnesses to tell you her condition, you could tell it by looking at her on the stand."

This statement and the refusal to move for a new trial constitute a frank admission that the verdicts are not excessive.

To meet the strong *prima facie* case of the plaintiff, *the defendant did not produce or account for either the engineer or the fireman of the train, or any passenger on the car or train*, though the defendant had the reservation lists containing names of all Pullman passengers, and the other trainmen, who were produced, were all thoroughly impeached and discredited.

The "**Statement of the Case**" of the defendant is so inadequate and so garbled and leaves out so many of the "attending circumstances" of the accident that we print as Appendix A to this brief the Statement of Facts printed in our brief in the Circuit Court of Appeals.

BRIEF.

WRITS OF CERTIORARI SHOULD NOT BE GRANTED HEREIN FOR THE FOLLOWING REASONS:

1. **These cases do not involve "principles, the settlement of which is of importance to the public as distinguished from that of the parties."**

Layne & Bowler, Corp. petitioners v. *Western Well Works, et al.*, 67 L. Ed. 712.

Federal Trade Commission, petitioner v. *American Tobacco Co.*, 71 L. Ed. 1193.

2. **"The conclusion of the Circuit Court of Appeals depends upon appreciation of circumstances which admit of different interpretations," and this court should "adhere to the usual ruling of non-interference in such cases."**

Federal Trade Commission, petitioner v. *American Tobacco Co.*, 71 L. Ed. 1193.

3. **The jury decided that there was a negligent operation of the train; the Circuit Court of Appeals has held there was sufficient evidence to warrant the verdicts, which decision upon the facts ought to be final.**

This court "will not grant a certiorari to review evidence and discuss specific facts."

United States of America, petitioner v. *James J. Johnston*, 69 L. Ed. 925.

Southern Power Co., petitioner, v. *North Carolina Pub. Service Co., et al.*, 68 L. Ed. 413.

4. **The decision of the Circuit Court of Appeals is not in conflict with any decision of this court.**

a. That this is a plain *res ipsa loquitur* carrier-passenger case in harmony with many decisions in

the Federal Courts, see, in addition to the cases cited in the opinion of the Circuit Court of Appeals, the following:

Hanlon v. *Southern Pac.*, 9 Fed. 2nd. 294.
Needham v. *C. & O. R. Co.*, 244 Fed. 146.
Kansas City Southern Ry. Co. v. *Clinton*, 224 Fed. 896.
R. R. Co. v. *Pollard*, 22 L. Ed. 877, 22 Wall. 341.
Gleeson v. *Virginia Midland R. Co.*, 140 U. S. 443, 35 L. Ed. 458.

b. *The Circuit Court of Appeals did not hold, as claimed by defendant, that the mere happening of the accident without proof of negligence made out a prima facie case.*

The defendant quotes but one sentence from the opinion; the whole opinion must be read to understand the law laid down. The following excerpt from the opinion completely disposes of the defendant's contention:

> "The court told the jury that the railroad company was not an insurer of the safety of its passengers; that the latter are not entitled to recover damages merely by showing they were injured; that the carrier was only liable for negligence in exercising that high degree of care that the law imposes upon it; and that there could be no recovery unless the jury found by a preponderance of the testimony that the injury was caused by an extraordinary and unusual lurching, etc., of the train, and not then, unless the same was caused by the defendant's negligence, and that the burden was upon the plaintiff to prove his case. The correctness of all this was not, for reasons we have stated, affected by the further instruction that if the injury was directly caused by an extraordinary lurching and jerking, the

> plaintiff need not go further and prove what negligence, if any, caused that lurching, the law presuming that an extraordinary occurrence of this kind was due to the fault of the carrier; but that this presumption was rebuttable, and not conclusive. *Mendelson* v. *Davis*, 281 Fed. 18; *Lee Line Steamers* v. *Robinson*, 218 Fed. 559."

5. **The decision of the Circuit Court of Appeals is not in conflict with Norfolk & Western Ry. Co. vs. Birchett, (4. C. C. A.) 252 Fed. 512, as claimed by defendant.**

Mrs. Birchett, alone in a dressing room of a Pullman car on a fast train, fell from a chair and hurt her arm; upon the trial she claimed she was caused to fall by a violent lurch of the car. *She produced no corroborative evidence whatever*, and admitted that at the time she made no complaint about any negligent handling of the train. The defendant by overwhelming proof established that "the train was operated in the customary manner" and that there was "no unusual movement of the car." Concerning the admissions of the plaintiff, the Circuit Court of Appeals said:

> "And the significance of all this is that it amounts to a full admission that at the time her injury was received she did not attribute it, by anything said or then suggested to those to whom she talked, to an unusual or violent lurching of the car, or to any improper operation of the train from which negligence could be inferred."

That court further said:

> "If it can be said that her testimony, *unsupported by a single circumstance*, raises a presumption of negligence, that presumption was

> overcome by evidence so convincing as to leave no room for reasonable doubt that the accident was not caused by any such extraordinary lurch as she describes."

It is evident that if in addition to the plaintiff's own narration of the accident she had offered any proof of "attending circumstances" from which a reasonable inference of negligence could be drawn that the Circuit Court of Appeals for the Fourth Circuit would have held that she had made out a *prima facie* case for the jury under the *res ipsa loquitur* doctrine.

The decision in the cases at bar is not in conflict with the decisions of the Fourth Circuit. We call the court's attention to the cases of *Chesapeake & Ohio Ry. Co.* v. *Needham*, 244 Fed. 146, (4th C. C. A.), and *Sprague* v. *Southern R. Co.*, 92 Fed. 59 (4th C. C. A.) Mrs. Needham claimed that while walking down the aisle of a car she was suddenly and violently thrown forward by a jerk of the car head long upon the floor. As to the lurching of the car she was "corroborated in the main by a young woman friend who was in the same car." The defendant offered six witnesses, "three of them passengers who saw the occurrence, to the effect that they did not observe any jolting of the car or other unusual motion." The Circuit Court of Appeals held:

> "In a word the plaintiff's proofs would sustain a verdict in her favor, while defendant's proofs show that she has no cause of action, this being the issue in dispute, we are of the opinion that defendant was entitled to the rejected instruction." (An instruction which required the plaintiff to prove by a preponderance of the

evidence that there was an extraordinary lurch of the car.)

In other words, the Circuit Court of Appeals for the Fourth Circuit held in this case that if a passenger on a moving train is injured by an extraordinary and unusual lurch of the train and the passenger offers corroborating proof thereof, such "proof would sustain a verdict" under the *res ipsa loquitur* theory.

In the Sprague case the plaintiff, a woman 67 years old, was riding as a passenger in a caboose which was standing still, then moved up, then stopped again, and "when it so moved up, it made a heavy jerk," and the plaintiff was thrown and injured. Plaintiff charged negligent operation of the train; the trial court dismissed the case and upon a writ of error the Circuit Court of Appeals for the Fourth Circuit reversed the case, holding that the plaintiff had made out a *prima facie res ipsa loquitur* case, and that the question whether the defendant had negligently handled the train was a question of fact for a jury, citing with approval:

Railway Company v. *Ives*, 144 U. S. 408.
Railway Company v. *Gentry*, 163 U. S. 353.

and the Pollard, Stokes, Tolson and Gleeson cases in this court.

6. **The decision of the Circuit Court of Appeals herein is not in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in Ozanne vs. Ill. Central R. Co., 157 Fed. 1004.**

In the Ozanne case the plaintiff, sixty-six years of age, was alone in the dressing room of a Pullman

car; she was "clubfooted," so deformed that her "feet were turned directly inward instead of straight forward in the usual way" (151 Fed. l. c. 901). The trial court said:

> "This misfortune made it necessary that she pass one foot over the other at each step, and * * * it may well account for her fall under the then abnormal conditions."

But the most important consideration concerning the Ozanne case is that the plaintiff did not attempt to recover upon the *res ipsa loquitur theory* of general negligence, but founded her cause of action *solely* upon the specific claim of negligence that the defendant was *negligent in failing to provide seats and handholds in the car.* In discussing this question, the trial court said:

> "There was no claim or testimony to show that there was any defect in the material nor in the structural perfectness of the car or of the ladies dressing room—the only claim we repeat is that the plan, form, etc., of that room were necessarily dangerous and that it was, *per se*, negligent for the defendant to run or use in its trains a car with a ladies dressing room of that sort."

Mr. Ozanne charged specific negligence and failed to prove it; that is all there is to that case. It does not in any manner conflict with the decision at bar.

7. The contention of the defendant that res ipsa loquitur carrier-passenger cases are confined to "collision, derailment and defective appliance cases" is wholly untenable.

The following Federal and State decisions disprove the contention:

Hanlon v. *Southern Pac. R. Co.*, 9 Fed. 2nd, 294.

Needham v. *C. & O. R. Co.*, 244 Fed. 146.

Kansas City Southern Ry. Co. v. *Clinton*, 224 Fed. 896.

Railroad Co. v. *Pollard*, 22 L. Ed. 877, 22 Wall. 341.

Gleeson v. *Virginia Midland R. R. Co.*, 140 U. S. 443, 35 L. Ed. 458.

Sprague v. *Southern Ry. Co.*, 92 Fed. 59 (Fourth Circuit).

Atlantic Coast Line R. Co. v. *Hamlett*, 89 So. 337, 81 Fla. 872.

Louisville Ry. Co. v. *Osborne*, 188 S. W. 419, 171 Ky. 348.

Abernathy v. *Lusk, et al.*, (Mo.) 182 S. W. 1049.

McMahon v. *N. O. Ry. & Light Co.*, (La.) 53 So. 857; 32 L. R. A. (N. S.) 346.

Jones v. *Chicago City Ry. Co.*, 147 Ill. App. 640.

Bell v. *N. Y. N. H. & H. R. Co.*, (Mass.) 104 N. E. 963.

Starkman v. *Interborough R. T. Co.*, 144 N. Y. S. 780.

Johnson v. *Atlantic Coast Line R. Co.*, (Va.) 99 S. E. 558.

Cooley v. *Dunham, Rec.*, (Mo.) 195 S. W. 1058.

McDermott v. *L. & N. R. Co.*, (Ky.) 206 S. W. 6.

Sever v. *M. & St. L. R. R. Co.*, (Iowa) 137 N. W. 937; L. R. A. 44 N. S. 1200.

Moreover, the attempted limitation of the doctrine is illogical and unsound. An illustration or two will suffice to show how untenable this proposition is.

Suppose a passenger is seated in a train and the adjacent window is open and there is such a sudden jerk and swerve of the train as to throw the passenger out the window; there is no derailment, no collision, no defective appliance involved. Could it be said that such fact alone would not create the inference that the train was negligently operated? Suppose in the case at bar the window at the rear of the berth had been open and Imogene Johnson, who was sitting with her back and feet braced to prevent being moved by an ordinary sway of the car, had by a sudden and violent jerk and swerve of the train been thrown diagonally across the berth and through the open window. No collision, derailment or defective appliance would be involved. Would the defendant claim that such violent and unusual movement of the train did not raise a reasonable inference that the train was negligently operated? Suppose instead of Imogene being thrown through the window, the window was closed, and while so braced she was thrown so violently against the rear corner of the berth that she broke her neck and at the same time Myrtle Johnson, who was bracing herself by her handhold on the partition between the berths, was thrown violently around and against the upper berth and fractured her skull and was thrown across the aisle to the floor, and there was no collision, derailment or defective appliance, could any court reasonably hold that such evidence

would not raise a reasonable inference that the train was negligently operated? Suppose this train was traveling at a rapid rate of speed and was coming to a curve which required the train to slow down "to take the curve" and the engineer negligently failed to keep a lookout for the curve and did not notice it until he was almost upon it and then suddenly slapped on the emergency brake so as to throw passengers violently about the cars, would that not constitute such a *prima facie* case of negligence as to require the defendant to meet it with such proof as it might have?

8. **The Supreme Court will not grant a writ of certiorari for alleged improper argument even though the Circuit Court of Appeals holds the argument improper and yet affirms the judgment.**

Michigan Mutual Life Ins. Co. v. Oliver, 256 Fed. 212.
Writ of certiorari denied June 9th, 1919, 63 L. Ed. 1187.

The Oliver case was a suit to collect insurance for death; the defense was suicide. The plaintiff's attorney in argument to the jury went outside the record and charged that defendant removed the case to the Federal Court in order to get away from "Conecuh County, where the public knew the facts of this case." The trial court upon objection ruled the argument proper; the Court of Appeals (Fifth Circuit) held the argument improper, but affirmed the judgment. Exactly what was done in the case at bar.

It is interesting to note that in the Oliver case the trial court instructed the jury that the law presumed

that deceased did not commit suicide, and that the burden was upon defendant to "overcome this presumption and *satisfy you by a preponderance of the evidence* that insured's death was voluntarily or intentionally inflicted."

The defendant petitioned for a rehearing and the Circuit Court of Appeals upon this subject said:

> "The charge on the subject of suicide and the presumption of law with respect thereto and the burden of proof was technically inaccurate."

Yet the judgment was affirmed and a writ of certiorari denied by this court.

9. **The argument complained of was proper; the record shows conclusively that the defendant attempted to prove "syphilis" as a defense, even though it put no witness on the stand to prove it.**

The Court of Appeals on this subject said:

> "An affirmative defense of this character cannot ordinarily be proved by cross examination."

We respectfully take issue with that statement. "Contributory negligence" and "assumption of risk," for instance, are affirmative defenses; they are proved every day *solely by cross examination*. Remember that the defendant in this case never had had the plaintiff examined by a physician before trial to determine her blood condition. Therefore, it was beyond its power to call a physician to testify as to her condition. The only thing left for it to do was to attempt to prove "syphilis" by cross examination of plaintiff's lay witnesses and physicians. That the defendant did

strenuously attempt to prove that defense, for sake of brevity, we cite the record.

See Record 149, 150, 184, 190, 191, 197, 198, 201, 205, 237, 311, 313, 347, 352, 353, 354, 355, 357, 359, 360, 374, 375 and 377.

The issue was first injected into the case by defendant's cross examination of Immogene Johnson at pages 149 and 150.

> "Did she show eruptions of the skin?" (A symptom of syphilis) and "Did * * * they give her hypodermic injections * * * or medicines internally" (ordinary treatment for syphilis).

The attending physician, Dr. St. Elmo Sanders, diagnosed the case as "Odema of the brain, resulting from injury." He prescribed iodide of potassium to absorb the clot on the brain. Throughout the trial defendant attempted to prove by cross examination that the doctors' diagnosis was wrong and that plaintiff had syphilis notwithstanding the Wassermann test showed negative. That such was the defense we only need to quote an excerpt from defendant's argument to the jury, Record p. 429:

> Mr. Marley: "Now, what do we have? I said nothing about this, but if you will remember they introduced a sheet made up by Dr. St. Elmo Sanders made on the 29th day of September, 1925, showing that on that day and on the 30th, the day following, he had a Wassermann test made and commenced to give her iodide of potassium. He had a positive diagnosis of it, too, gentlemen. We know and the evidence of these physicians, medical men show, *that iodide of potassium was the old remedy for a specific trouble;* and right

on there was a Wassermann test. That suggested to me that the doctors had made a wrong diagnosis of the case and had been giving this poor woman the wrong treatment."

Here is a definite charge that iodide of potassium was given because the plaintiff had syphilis, and that Dr. Sanders was wrong in diagnosing the case as "Odema of the brain, resulting from injury."

The record is so voluminous and so full of proof that the defense was "syphilis" and that defendant injected such defense into the case, in view of the language employed by the Court of Appeals, we feel compelled to print as an appendix to this brief that portion of our brief in the Circuit Court of Appeals upon this subject, and for brevity, refrained from further agument.

The law has wisely given Federal Trial judges a wide discretion in controlling argument by counsel, and unless the record plainly and unequivocally shows a gross abuse of such discretion the Court of Appeals upon a writ of error will not reverse the trial judge, and particularly is this so when the defendant did not move to discharge the jury, or ask the trial court to admonish counsel, or request the court to instruct the jury upon the subject.

10. **The granting of a writ of certiorari in Northern Railway Company vs. Page, 274 U. S. 65, is not a proper precedent for a writ in this case, as contended, for the following reasons:**

a. The defendant in the Page case exhausted its remedies in the Circuit Court of Appeals by petitioning for a rehearing.

b. The opinion of the Circuit Court of Appeals in the Page case *shows upon its face* that it was based upon speculation and conjecture, and rested solely upon the highly speculative conclusion that because "the conductor, did not testify as to what he said to the officers in charge of the troops prior to the shooting, but did testify that when the shooting began he cried out that there were no revolutionists on the train, nothing of the kind was said until after the shooting began." And this in a case where the burden of proof was upon the plaintiff to establish the negligence of the defendant. The failure of a defendant's witness to testify upon the subject did not constitute affirmative proof needed by the plaintiff to make out a case.

c. The "uncontradicted evidence" established "that the shooting was an occurrence that could not reasonably have been anticipated," and hence, the defendant could not "be held liable for the injuries inflicted upon plaintiff by the Government forces."

c. The trial judge in the Page case set aside the verdict because of a total lack of evidence to prove negligence. Moreover, the opinion of the Circuit Court of Appeals was by a divided court.

11. **The granting of a writ of certiorari in the case of Gulf, Mobile & Northern Railroad Company, Petitioner, vs. Wells, 72 L. Ed. 152, is not a proper precedent for granting a writ herein, as claimed, for the following reasons:**

a. The Wells case arose under the Federal Employers' Liability Act and the writ was issued to the

Supreme Court of Mississippi, the defendant having exhausted all its remedies in the lower courts.

b. The case was decided by the Supreme Court of Mississippi "without opinion."

c. Plaintiff's testimony that while he had hold of the grab iron "he stepped on a big piece of coal, his foot turned, and he went down and the engine gave an unusual jerk" and he fell and hurt his knee, *was wholly uncorroborated.* The entire train crew testified there was no unusual jerk. Moreover, this court said: "There was no evidence that the engineer knew, or should have known, that Wells was not on the train." And further: "Aside from this, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine." And: "In no aspect does the record do more than leave the matter in the realm of speculation and conjecture."

12. **Except in most extraordinary cases writs of certiorari should not be issued to review decisions of the Circuit Courts of Appeal in cases where the petitioner has failed to move for a rehearing under the rules.**

Very little consideration should be given a litigant who complains about a judgment such as this when it has refused to move for a new trial and thus give the trial judge an opportunity to pass upon alleged errors, and who then complains of the decision of the Circuit Court of Appeals and has refused to move for a rehearing with sixty days (Rule 29-C. C. A. 8th Circuit) and thus deprives that court of an opportunity to pass

upon alleged errors. Just plain common decent consideration for the trial judge and the judges of the Circuit Court of Appeals demanded such action.

Writs of error and writs of certiorari should not be allowed to supplant motions for new trials and petitions for rehearings. Before a litigant comes to this high court and asks for a writ of certiorari he ought to fairly exhaust his remedies in the Circuit Court of Appeals. This defendant did not do that. A motion for rehearing ought to be a condition precedent, under ordinary circumstances, to a petition for a writ of certiorari. The Circuit Courts of Appeal are just as anxious to correctly decide cases such as these as this court could possibly be, and the rules allow the defeated party sixty days in which to move for a rehearing. Good faith and fair treatment of that court compels such course of procedure. Of course there are cases where writs of certiorari ought to be granted, but this case is not one. No matter of public importance is involved—this is a purely private controversy—no general principle of law has been wrongly applied so as to constitute a bad legal precedent, there is no conflict with decisions of other circuits; to grant this petition and issue the writs prayed for will open the flood gates for petitions in a myriad of cases. The petitions should be denied.

Respectfully submitted,

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APPENDIX A.

(STATEMENT OF FACTS IN RESPONDENT'S BRIEF IN CIRCUIT COURT OF APPEALS.)

STATEMENT.

The "statement" in plaintiff in error's brief is inadequate because it does not properly or sufficiently set forth the facts upon which liability is predicated. It is admitted that plaintiff, Myrtle Johnson, was a passenger on one of defendant's trains, running from New York to Chicago on September 27th, 1925, occupying berth lower 8, car 64 (Rec. p. 105), said berth being on the right-hand or north side of the train as it was traveling west. The plaintiff and her sister-in-law, Imogene Johnson, had left Kansas City "the last of August" (R. 103) and had gone to California, Washington, St. Paul, and Chicago, arriving in New York "about five or six days" (R. 104) prior to the injuries complained of. They left on their return trip September 26, (R. 105) stopping over night at Nyack, N. Y., with "a girl friend of mine who was secretary of the Country Club" (R. 105); they then boarded the New York Central train at Harmon about six-thirty (6:30) p. m. September 27th (R. 105) and their grips were put in their berth (106) and then after going into the ladies room and washing up they took off their coats and left them in their seats, keeping their hats on, and then "went back to the dining car where we had a lovely dinner there in the diner" (R. 106); they re-

mained in the dining car "quite awhile" (p. 107); "As both had unusually good appetites that night" (p. 107); they then started to go to the club car and on the way "passed through our car" (p. 107); at that time "they had begun making down the berths" (p. 107); they stopped and "got a deck of cards out of our grip" (p. 107) and went to the club car where they played "rummy" until "sometime between eleven and midnight" (p. 107); and then they went back to car 64 to go to bed; at that time "just the night lights (were) burning" (p. 107); all the other passengers in that car had gone to bed (107); Myrtle preceded Imogene to the berth (p. 107); they decided that they would not take their heavy suit cases back to the dressing room in order to prepare for bed, and that they would take their night clothes out of the grip and take them back to the dressing room (R. 108); Imogene was the one who attempted to get the night clothes out of the grip (108); Myrtle, having preceded Imogene, stood in the "aisle at the foot of the berth, near the foot of the berth, and she stood there clutching on to several folds of curtains her hand sort of placed in the partition at the foot of the berth that separates it from the berth just below," (R. 108), Myrtle was "partially facing" Imogene (R. 108); Imogene "sat on the side of the berth about like this, with my leg braced here, and my back braced here on the arm, as you know, that comes out from the berth, * * * I had my back * * * to the direction we were going" (R. 108); Imogene then testified:

"Q. Now, tell the court and jury what happened there?

"A. Well, just as I opened the suit case, threw the lid back and was just reaching in for the night things and we were going along at a very good speed, this train had been going at a good speed all evening, and just as I threw this lid back and started reaching for my night things, there came the most terrible jerk, almost as though the train were going to stop, but didn't and jerked and swayed and went on, and at the time of this jerk, I, of course, was braced here against this arm of the seat, or the berth, the side of it, and after it yanked and went on it threw me across, diagonally across my berth toward the foot, the lower end and right side of the train, lurched on to the bed clothes at the foot of my berth."

Imogene further said:

"No, I was sitting on the berth with my back braced against the arm of the seat" (R. 142),

and

"I was just sitting here with my foot braced in the aisle" (R. 144),

and

"This was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced" (R. 112); "The sudden lurch, * * * swung her (Myrtle) around" (R. 145); "She was trying to hang on to the curtain" (R. 145).

Myrtle testified:

"I was standing there holding on to the curtain," "with my right hand" (R. 274); "Had it just below the upper berth, just holding it below the upper berth and securing it on the board that

separates the two berths and my left hand on my hip" (R. 274);

and

"I was protecting myself, or bracing myself • • • I was standing there steadying myself" (R. 305)

and

"The train gave an awful jerk and jolt and a terrible lurch" (R. 275);

and

"And I had my hand hold of the curtain just below the lower part of the upper berth, and held it up against the board that separates the two berths from one another, and my left hand on my hip, and this train gave a sudden violent lunge as though it stopped, and threw my whole body around and threw my head up against the edges of the upper berth with such force it knocked my head down on my shoulders and then it threw me with such force that it finally threw me to the floor" (R. 276-7).

and then

"Everything got black and I got sick at my stomach, and the next I remember I was sitting up on the berth" (R. 277).

Imogene, although bracing herself with her foot in the aisle and her back against the arm of the seat, and although she weighed 160 pounds (R. 94) "was violently thrown diagonally across our berth, my leg hanging off, that is, would be in the air, and my left hand clutching the sill of the window at the lower end of the berth and my other hand and arm over the cover

of the suit case and clutching at the bed clothes at the foot of the berth" (R. 109); Imogene heard Myrtle moaning and scrambled to her feet to see what had happened to her (109). She was sitting in the aisle toward the berth across the aisle, but nearer the head of the berth toward the engine (109); Myrtle was "rocking back and forth in the aisle saying 'Oh, my head, Oh, my head' and I believe she said 'Oh, my God' " (R. 110); she then helped Myrtle up and put her on the edge of the berth and "rubbed her head and talked to her" (110); Imogene then helped Myrtle to undress and put her to bed; all the other passengers had already retired; what happened when they awoke the next morning is best told by Imogene (R. 114):

> "A. Well, I felt something clutching at me, and something seemed to be jerking at me, and I was half asleep, and I didn't know what it was, and so I didn't get right up, or awaken right away, and it continued, and then I became conscious that there was a noise, a gurgling, a peculiar noise as though someone were crying and moaning, and so, of course, that came through my consciousness finally, that something was wrong and I sat up and she was sitting up behind me reaching over with her left hand and trying to get my attention, with her face all drawn, and telling me something that I couldn't understand, and crying and clutching at me."

Myrtle was paralyzed on her entire right side, the right side of her face was "drawn as if someone had pulled it over to the left side" (114); Myrtle was uttering "inarticulate sobs"; it was a crying as though she was trying to make noises and they couldn't come out the way she wanted them to" (R. 114); her arm

and leg were "clammy and cold" (R. 115); Imogene tried to aid Myrtle by massaging and starting the circulation; (R. 116) she then "rang for the porter" (116) and "asked the porter to get the conductor quickly" (R. 116); the conductor came (116); she "*asked the conductor to see if there was a doctor on the train, that my friend had been hurt the night before in that jerk and something had to be done for her quickly*" (p. 116); no doctor could be found, but "The conductor said he thought there was a nurse on the train" (116); the conductor brought the nurse and "I told the nurse about the accident the night before" (116); Imogene "asked the conductor to wire ahead to the nearest station where we would be for any length of time and have a doctor there and he told me that he would wire at the next station for a doctor to meet us in Chicago" (117); a doctor did meet her at Chicago. "The physician and the conductor carried Myrtle out of the train" (118); Dr. Pearce, the company doctor, made a superficial examination of her (R. 119); then she was put in a wheel chair, and then a taxi, and taken to the Dearborn Street station where she was put in a compartment on the Santa Fe (119) and brought to Kansas City, where she was met by a doctor (120) and taken to Grace Hospital. *Up to this time Myrtle was unable to talk, one-half of her tongue being paralyzed;* Dr. Sanders diagnosed her case as "odema of brain from injury causing partial paralysis of right side" (R. 159); from that time on until the time of the trial she was under the care of various doctors and osteopaths who testified that her condition was permanent and

incurable; as the railroad company is not and cannot under writ of error raise any contention as to the amount of the verdict any further statement of her injuries and present condition is unnecessary. The record is filled with evidence that at the time of the accident on September 27, 1925, the plaintiff and Imogene both weighed about 160 pounds (R. 94) (plaintiff at the time of the trial weighed about 130 pounds and after the accident weighed only 118 pounds); that before she was hurt she was in "perfect health," "good color and bright, clear eyes, athletic"; "she was a perfectly normal woman up until the time" of the accident (R. 361); she had a "rosy" complexion (329); she had never had treatment by any doctor prior to her injury and had never been sick "in any way, shape or form prior to the injury" (R. 290); at the time of the trial she was but a shadow of her former self; she looks "lifeless; pepless;" (R. 322). She talks incoherently, "she will talk to you for instance and break off in the middle of a sentence and start talking about something else" (R. 322). "She drags her right foot" (R. 321) like a hemiplegic; "She can't wash dishes, she would drop the dishes" (322); "She cannot carry on her business as a hair dresser" etc. etc. She is a confirmed invalid.

The extraordinary lurch or jerk or sudden stopping and sudden starting of this train catapulted Imogene Johnson, who was sitting at the front end of the berth *with her right foot braced upon the floor and her back braced against the arm of the seat,* violently against the rear corner of the berth with her hand clutching the window sill of the rear window and her

feet hanging out in the air; the sudden and violent lurch was so great as to tear Myrtle's grip from the partition between the two berths which she was using to steady herself and threw her around and crashed her head against the upper berth tearing her grip from the curtains and throwing her to the floor of the car; the crash of her head was so great as to cause a lesion and hemorrhage of the brain, the scar tissue from which was plainly shown in the X-ray pictures offered in evidence. Defendant admitted that "all of a sudden there was a check of the car and it pitched her forward • • • The tendency is just like the cracking of a whip" (p. 431). Defendant admitted that there was evidence of a "thickening of the pia mater of the brain" (253). It was conclusively established that such scar tissue and thickening was over the motor area of the brain that affects the right side of the body.

The qualifications of Imogene and Myrtle to testify as to the "extraordinary movement of the train" were amply proven. These two women had been extensive travelers and the record shows that each of them had traveled at least fifteen thousand miles before this accident (111). To meet this strong *prima facie* case of negligence, the defendant put upon the stand certain of the train crew who testified that they did not know anything about the cause of the accident, but we submit that an examination of the testimony of each one of these witnesses will show that their testimony is worthless and that each one of them was impeached. It appears undisputed that on the morning following the accident the conductor of the train wired for a doctor

to meet the train at Chicago and that he was told about how the accident happened, yet the defendant failed to put upon the stand a single passenger who had a reservation in that car and who must have known about the accident and the condition of the plaintiff all the next day enroute to Chicago. The defendant did not put upon the stand the engineer or fireman of the train—most important witnesses, nor the nurse who attended plaintiff and who knew about the accident.

Kates, the colored Pullman porter, did not testify as to where he was when the accident happened. He admitted that he got the conductor of the train to see the plaintiff (p. 384); the colored maid, Emmy Mathews, while testifying that she did not remember anything unusual in the movement of the train became completely confused in her testimony as to the condition of the plaintiff the following day and thought that "drinking lemonade might paralyze a person" (391); she was thoroughly discredited.

Martin Kane, the train conductor, testified that he did not remember any unusual jerk or jar on that trip (393), but that his attention had been first called by the claim department to this accident "a couple of months, at least, after the accident." *It was the conductor of the train, to-wit, Kane, who wired ahead for a doctor, and hence he was thoroughly discredited by his own testimony.* The rear flagman, John B. McCormick, testified that he didn't learn anything about the plaintiff being hurt (395), but his testimony was discredited because of his cross examination appearing on page 396.

The passenger brakeman, Jerome S. Connors, testified that he didn't remember any unusual jerk of the car (398), but his testimony was likewise discredited because he admitted that the first time his attention had been called to the case was when he "was ordered to go to the claim department in Buffalo" (398) and he couldn't remember what year it was that he was ordered there he never even heard about the plaintiff being injured. His testimony amounted to nothing.

Walter Vernon, the Pullman conductor, was not even asked by defendant's counsel if he felt or observed any unusual lurch or movement of the train; he merely testified that the first he learned about the plaintiff striking her head was the next morning; that "she had a stroke or something and was very ill" (400); he became thoroughly discredited by claiming to have talked with Myrtle Johnson the day following the accident and when it was definitely established that her tongue was so paralyzed that she could not talk. He admitted that a trained nurse, "a white lady" (404) was found on the train to treat the plaintiff, a witness which the defendant did not produce. He was clearly discredited in his testimony concerning the condition of plaintiff after the accident and saying that the first time that any claim agent or lawyer for the railroad had ever discussed his evidence with him was when he took the stand (408), notwithstanding the fact that he came from New York for that purpose.

The above were the only witnesses for the defendant who were on the train, and one of them said that

the plaintiff claimed that she stumbled over a grip, and another said that the plaintiff claimed that she bumped her head while getting over her sister in the berth, both stories being positively untrue. These two witnesses were discredited by defendant's own counsel who admitted in his closing argument that Myrtle and Imogene both told the truth (p. 427). *There was no explanation whatever offered to rebut the positive proof of the plaintiff.* Such was the state of evidence at the close of the case, and the jury was thoroughly justified in disbelieving defendant's witnesses and returning a verdict for the plaintiffs. The defendant knew the morning following the accident that Imogene was claiming that Myrtle had been seriously hurt by a violent lurch of the train, and the defendant was in a position through its conductor, to obtain the names of all persons in that Pullman car or that train; the reservation cards were available to them when the lawsuit was brought. The failure to produce any passenger on that train, the nurse, the engineer and fireman is very significant. The defendant wholly failed to rebut the plaintiff's positive evidence, and the presumption which arose from such facts.

Defendant's counsel in his closing argument (p. 427) said:

> "I believe Imogene and Myrtle both undertook to tell the truth according to their understanding of the situation—I don't think either one undertook to misrepresent, and I want to say to you that I don't believe any of them did."

After commenting upon the fact that the plaintiff produced 21 witnesses to testify "to the condition of this poor woman" (p. 427) he said:

> "You didn't need those witnesses to tell you her condition. You could tell it by looking at her on the witness stand."

Defendant's counsel further admitted (431) "but all of a sudden there was a check of the car and it pitched her forward • • • it pitched her forward. The tendency is just like the cracking of a whip."

Defendant's counsel in his closing argument did not even claim that Myrtle Johnson was negligent in any manner.

APPENDIX B.

(RESPONDENT'S ARGUMENT IN CIRCUIT COURT OF APPEALS IN RE ALLEGED IMPROPER ARGUMENT.)

The court did not commit error assigned in Specifications XX, XXI, XXII and XXIII; the defense was "syphilis"; the arguments complained of were proper; the exceptions were inadequate; the limits of argument are within sound discretion of trial court.

We will discuss these assignments together because they cover the same subject. The court did not err because:

(a) The defendant by cross examination attempted to prove that Myrtle Johnson was suffering from syphilis and that was the only defense relied upon, so far as the extent of damages was concerned.

(b) The control of argument by counsel is a matter within the sound discretion of the trial judge, and there was no abuse of discretion.

(c) The objection made to the argument was foundationless and inadequate.

(d) After the argument of Mr. Chilcott, complained of in Specifications XX and XXI, counsel for defendant in his closing argument (p. 429) again charged that Myrtle Johnson was suffering from syphilis.

(e) Defendant did not move to discharge the jury and/or did not request any instruction to the jury on the subject.

That the defendant in its cross examination of practically all of plaintiff's witnesses attempted to

prove that Myrtle Johnson was suffering from syphilis, and that that was the cause of her paralysis, is easily demonstrated by a reading of the record. The attempt to prove that she was suffering from syphilis began with the very first witness, Imogene Johnson, (page 149) and continued and persisted with practically every witness thereafter. The cross examination on this subject is too voluminous to quote in this brief. It will be found upon the following pages of the Record: 149, 150, 184, 188, 190, 191, 197, 198, 201, 205, 237, 311, 313, 315, 347, 352, 353, 354, 355, 357, 359, 360, 374, 375, and 377.

Beginning with Imogene Johnson counsel sought to show that Myrtle Johnson had an "eruption of the skin" (which is one of the symptoms of syphilis); "didn't it look a little bit as though it was a kind of pimple and yet it wouldn't come to a head" (p. 149), (a symptom of syphilis); defendant tried to get Imogene Johnson to say that Myrtle Johnson had "hypodermic injections" (p. 150), (ordinary treatment for syphilis); at page 184 plaintiff asked Dr. St. Elmo Sanders "has all the improvement that is to take place, taken place," and Mr. Marley objected because the question did not include "any tests of the blood that he made, now. There is a treatment here, iodide of potassium and all those elements ought to be taken into consideration in giving an opinion upon this point" (iodide of potassium is a well recognized treatment for syphilis); at page 188 defendant again asked Dr. Sanders about his administration of iodide of potassium (attempting to show it was given for syphilis);

and at page 191 defendant sought to prove in its cross examination of Dr. Sanders that "they some times take blood tests that show negative, when as a matter of fact there is a positive condition there" (the inference sought was that Myrtle Johnson had syphilis regardless of the negative test); and by the same cross examination on the same page defendant attempted to prove that even though the syphilis was not in active form there was present a "luetic condition," and that the proper thing for the doctor to have done was to have taken a spinal test and not have relied upon a blood test; in the cross examination of Dr. Richman (p. 197) defendant sought to show that the Wassermann test was unreliable and that the plaintiff might have had syphilis regardless of the negative finding by the blood test and that even though there was a negative finding she still might have a "leutic condition" of syphilis, and that when the syphilis "gets down into the nerves and the tissues" a lumbar test should be made (p. 198); and that if the attending doctor "had a suspicion in his mind that the *plaintiff* was suffering from neurosyphilis, to confirm his suspicion he would take a fluid test from the spinal column in the lumbar region, wouldn't he?" (p. 198); (later examination shows that defendant contended that neurosyphilis was that stage of syphilis in which the disease germ, "spirochaeta pallida," became active in the nerves and their sheaths); in the cross examination of Dr. Bahr (p. 201) the defendant sought to prove the same thing and that the attending physicians ignorantly or negligently failed to make a spinal column test, the

inference being perfectly plain that the defendant was contending that Myrtle Johnson had syphilis which fact could have been proven if a lumbar test had been made; in the examination of Dr. St. Elmo Sanders at page 205, the subject of "locomotor ataxia" was discussed when defendant's counsel said: "I don't believe there is a question of locomotor ataxia in this case at all," and then Mr. Wickersham said: "If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question." And then Mr. Marley said: "I am saying now there was nothing said about locomotor ataxia, and he's going into something that isn't within the range of the testimony as developed at this time * * *." Upon objection being sustained, Mr. Wickersham said: "The idea was, Your Honor, that the evidence about the blood tests—I want to go into it if there was any question about it." (It will be noted that Mr. Marley was merely claiming there was no evidence of locomotor ataxia, but was claiming, nevertheless, that Myrtle Johnson had syphilis and not locomotor ataxia); at page 237 when certain X-ray pictures had been identified and offered in evidence, Mr. Marley objected to their reception in evidence, "Because it would embody any mistakes they made in the diagnosis of her case" (Mr. Marley was still hammering at "syphilis" before the jury); in the cross examination of Myrtle Johnson, page 311, defendant tried to get the plaintiff to admit that the serum that was injected into her arm by Dr. Geraughty was "salvorsan" (a treatment for syphilis); and again at page 313 counsel tried to bring out that the internal

medicine administered was "bismuth," and at page 315 that "hypodermic injections" were administered; in the examination of Dr. Geraughty at page 347 the doctor had testified that plaintiff's skin was "perfectly clear, no existence of eruption" and he was then asked about the "bony condition" and he answered: "In syphilis the bones of the body seem to be affected very prominently, pains in the bones, especially in the shin bones, it has been very characteristic in the chronic cases," thereupon Mr. Marley said: "We object to that because there is no evidence of a chronic case," and Mr. Wickersham said: "Let the record show that he doesn't claim that," then Mr. Marley said: "The chronic case would be in the tertiary state" (plaintiff was attempting to show that syphilis did not exist in any stage, either first, second or third), and when the doctor stated that pains in the bones were characteristic in the chronic cases, meaning third stage, Mr. Marley objected because there was no evidence that the disease in this case was in the third stage, but would make no admission that it did not exist in the first or second stages; and it is plain, beyond dispute, that the defendant was claiming that the plaintiff was suffering from syphilis in the second stage, that is, after the first stage when the syphilis germ "gets down into the nerves and the tissues" (p. 198); that defendant was claiming that she was suffering from syphilis in the second stage is clearly evident from the defendant's cross examination of Dr. Geraughty and particularly at page 353 where the following occurs:

> "A. As a rule the secondary state, secondary symptoms is the skin."

"Q. This germ is what is called the spirochaeta?"
"A. Yes, sir."
"Q. Spirochaeta pallida, that is the full name, the first test they use is what is call the Wassermann test of the blood to find out that condition?"
"A. Yes, sir. Wassermann test is used."
"Q. After it gets beyond that stage and gets in the stage of neurosyphilis, the blood test is not accurate" (the defendant was contending that the taking of the Wassermann test and the giving of iodide of potassium, and the general conditions demonstrated that the plaintiff had syphilis and that being in the second stage of syphilis, to-wit, neurosyphilis, the blood test which was given was not accurate and that the defendant could rightfully contend that she had syphilis in the second stage)."

Defendant evidently tried to show on the cross examination of Dr. Geraughty (p. 354) that the doctor "became suspicious of locomotor ataxia"; and on the same page attempted to show by the doctor that "**lesions in what is called neurosyphilis**" "**come along in the tissues and form along in the nerves what is called gummatous formations,**" and "tubercules" that "press on the nerves, the tissues that is next to it" and "**keeps on increasing until it presses down and paralysis is the result**" and that such pressure "is along the arachnoid membrane," which "is between the dura mater and the pia mater" and that "it also gets in the meninges" which "covers the brain, the spinal cord and everything" and "**after that is done, don't it begin to form there so as to paralyze one side of the body** and by pressure cause what you call occlusion" (p. 355), and "presses down, and isn't there a formation there what you doctors call a thrombosis forma-

tion" (*here was a definite attempt by counsel for defendant to prove that the paralysis in question was due to syphilis and not to traumatism*); at page 357 defendant's counsel again sought to prove syphilis and asked Dr. Geraughty, on cross examination: "**Now isn't it a fact, Dr. Geraughty, that in neurosyphilis that it is slow and insidious, it is true, but it sometimes reaches a state that even a slight shock will bring on the paralytic stroke, hemiplegia, as you call it**" (another positive attempt to show that plaintiff had syphilis); at page 359 defendant on cross examination of Dr. Hines said: "Doctor, did she tell you that she had a Wassermann test and that it showed positive?" (an effort to prove syphilis). On cross examination of Dr. Mella, page 360, defendant's counsel asked: "But doctor, you didn't make any examination as to a blood condition at all" (defendant again directs the jury's attention to syphilis); on the cross examination of Dr. Krall, page 374, defendant again tried to show that plaintiff admitted that the Wassermann test showed positive, and at page 375, attempted to show the administration of bismuth.

The cross examination by defendant of practically every witness furnishes abundant evidence that defendant was attempting to prove that plaintiff had syphilis and when Mr. Chilcott in his argument charged: "That is the defense in this case, that she had the syphilis" Mr. Marley merely said: "I object to that, Your Honor, there is no evidence of that at all, it isn't proper argument." Can there be any question as to the propriety of the court's ruling that "The objection is over-

ruled, in view of the examination of the witnesses, and of the testimony in the case?" The sole objection was: "There is no evidence of that at all." The record is full of evidence that such was the defense. It was clearly established that that was the defense. The limit of argument upon matters in evidence is a matter within the sound discretion of the trial judge and the court's ruling was right and proper.

Moreover, after Mr. Chilcott had concluded his argument, Mr. Marley in his own argument to the jury directly charged that the plaintiff was suffering from syphilis (p. 429).

In Mr. Marley's closing argument to the jury he said (p. 429):

> "Now, what do we have? I said nothing about this, but if you will remember they introduced a sheet made up by Dr. St. Elmo Sanders made on the 29th day of September, 1925, showing on that day and on the 30th, the day following, he had a Wassermann test made and commenced to give her iodide of potassium. He had a positive diagnosis of it, too, gentlemen. We know and the evidence of these physicians, medical men show that iodide of potassium was the old remedy for a specific trouble; and right on there was a Wassermann test. That suggested to me that the doctors had made a wrong diagnosis of the case and had been giving this poor woman the wrong treatment."

This statement by counsel for the defendant, when properly understood and analyzed, shows definitely that the defendant was charging that Myrtle Johnson was suffering from syphilis. It is a positive admission that the defense was "syphilis."

The "sheet" referred to by Mr. Marley is Plaintiff's "Exhibit 4 A" (p. 159) and also Plaintiff's "Exhibit 4 C" (195). The first exhibit referred to shows Dr. Sanders' final diagnosis as follows: "Oedema of brain from injury, causing partial paralysis of right side." That is the "positive diagnosis" which Mr. Marley refers to. He then says: "We know and the evidence of these physicians, medical men show that iodide of potassium was the old remedy for a specific trouble." The "specific trouble" Mr. Marley refers to is syphilis. All through his cross examination of the doctors he speaks of syphilis as "specific." He told the jury that Dr. Sanders had not only given the plaintiff a Wassermann test, but had commenced to give her iodide of potassium which Mr. Marley claims was an old recognized medicine to be given for syphilis. On page 188 of the record Mr. Marley cross examining Dr. Sanders said:

> "Q. Now, I notice here you gave her iodide of potassium?
> A. I did, yes, sir.
> Q. What is that for?
> A. That is for the absorption of any brain edema or any possible clot or exudate that may be there."

Now it is clear that Dr. Sanders' diagnosis was "oedema of the brain from injury" and that he administered iodide of potassium for the purpose of absorbing any brain oedema or any possible clot or exudate that might have been there, but Mr. Marley, openly charged, in his argument above quoted, that the plaintiff had syphilis and that Dr. Sanders, administered

iodide of potassium as a remedy for syphilis. He did not use the word "syphilis," but his meaning is plain and clear. A juryman would be dumb indeed who did not understand that Mr. Marley was charging that the plaintiff had syphilis and that Dr. Sanders was giving her iodide of potassium as a treatment for syphilis and that Dr. Sanders had made a "wrong diagnois," and if the plaintiff had oedema of the brain Dr. Sanders was "giving this poor woman the wrong treatment," and should have given her some other treatment. To repeat, the sum and substance of Mr. Marley's argument that when Dr. Sanders diagnosed the plaintiff's injuries as "Oedema of the brain from injury" such diagnosis was wrong and the fact that Dr. Sanders took a Wassermann test and gave to the plaintiff iodide of potassium was positive evidence, in his opinion, that the plaintiff had syphilis; no other reasonable conclusion can be drawn from the argument of defendant's counsel and it was perfectly right and proper for the plaintiff's counsel in their argument to the jury to comment upon such a charge and it was perfectly proper to comment vigorously. The fact about the matter is the plaintiff so conclusively established that she did not have syphilis that defendant's counsel attempted to repent of his error before his final argument was concluded. Defendant, by its extended cross examination of the plaintiff's doctors upon the subject of syphilis and attempting to prove that she had syphilis and by the closing argument in which he charged that she had such "specific trouble" opened the door for comment by plaintiff's counsel upon such defense.

Let us assume as a fact that plaintiff did not have syphilis at all, and that defendant had no evidence whatever to prove that she did have syphilis; then the attempt of defendant's counsel to prove she had syphilis was contemptible; it was a terrible thing to do; it was an attempt to put a stigma upon a pure and innocent woman; an attempt that any lawyer was in duty bound as an advocate and as a man to sternly denounce. Syphilis is defined by Webster as "a chronic, specific, contagious venereal disease." It is loathesome—something to be shunned. A woman is not considered "decent" who is known to have the dreadful disease. Any railroad company defending an honest claim against it for damages that openly or covertly charges or insinuates that a pure and innocent woman has such a loathesome, dreadful, contagious, venereal disease, deserves the condemnation of every man that honors womanhood, and a lawyer who represents such a good woman thus basely maligned who would not on her behalf expose and condemn such assailant is unworthy to practice law. No court will ever take from such a woman a just judgment because her lawyer exposed such a contemptible defense.

The trial court heard the evidence, saw the witnesses, observed their manner and demeanor, heard the defendant's counsel cross examine the plaintiff and her doctors, observed his manner, intonation, inflection and emphasis, understood the nature of the defense, the charges and insinuations, knew and understood the whole "atmosphere" of the trial, and was

thus in a far better position than any appellate court could possibly be to determine what the defense was and what were the proper limits of argument. The law has wisely given Federal trial judges a wide discretion in such matters, and unless the record plainly and unequivocally shows a gross abuse of such discretion the court of appeals upon a writ of error will not reverse the trial judge, and particularly is this so when the defendant did not move to discharge the jury or ask the trial court to admonish counsel or request the court to instruct the jury upon the subject.

Dunglison's Medical Dictionary says that while the etymology of syphilis is unknown, that it is very probably derived from the Greek word "siphlos"—formed, by a contraction from "sipalos"—meaning "*a reproach.*" It is a "chronic, specific, contagious venereal disease."

To falsely charge that a woman has syphilis is libelous or slanderous *per se.* Were it not for immunity arising because the charges were made in court, the defendant would be liable in damages to the plaintiff, the proper innuendo being laid.

Odgers in his work on Libel and Slander (4th Ed.) 1905, page 48, Sec. 2 says:

> "Words imputed to the plaintiff that he has an infectious or contagious disease, are actionable without proof of specific damage. *For the effect of such imputation is naturally to exclude the plaintiff from society.* Such disease may be either leprosy, venereal disease, or it seems the plague * * *. Any words which hearers would

naturally understand as conveying the meaning that the plaintiff then has such a disease are sufficient."

Newell on Libel and Slander (3rd Ed.), 1914, p. 240 says:

"Defamatory words falsely spoken, of a person which imputed that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society, are actionable within themselves without proof of specific damages."

The court in *Golderman* v. *Stearns*, 7 Gray (Mass.) 181 says:

"The charge against a person of his having the venereal disease is held to be actionable * * *, not because the charge imputes any legal or moral offense, but solely because it tends to exclude him from society as a person having a disgusting and contagious disease * * * and with whom it is unsafe to associate."

36 C. J. p. 1167 says:

"The general rule is that to charge one orally with a disease which would wholly or partially exclude him from society is actionable *per se*. * * * The principle has been applied to venereal disorders." Citing *King* v. *Pillsbury*, 115 Main 528; *Simpson* v. *Press Pub. Co.*, 67 N. Y. S. 401; *Watson* v. *McCarthy*, 2 Ga. 57; *McDonald* v. *Nugent*, 122 Iowa 651, and others.

"License of speech of counsel in addressing the jury is largely within the discretion of the trial court which has power to regulate or control the argument" 38 Cyc. 1472.

Mr. Marley in his closing argument said that he believed Myrtle and Imogene told the truth: "I don't

think either one undertook to misrepresent" (427); he also said: "I have known Imogene ever since she was a girl. I knew her mother, and a grander woman than her mother never lived. * * * I know her desire to tell the truth, and I believe Myrtle's desire was the same."

Mr. Marley personally knew these people and admired them, and justice to him demands the statement that he personally was not and could not be the instigator of such slanderous charges, and that as local counsel he was merely following the defense outlined by his associate. Everything that occurs at a trial is not taken down by the reporter and that is why trial courts are accorded discretion in matters of argument, and that is why the court said: "Counsel may draw inferences from the facts as he sees them."

In the case of *Straus* v. *Ry. Co.*, 86 Mo. 421, where a passenger was injured by the sudden starting of a car, counsel for plaintiff in his argument to the jury commented vigorously upon the failure of the defendant to produce a certain witness, to which argument defendant objected and "asked the court to interfere and rebuke counsel for discussing facts not in evidence" and "the court interfered no further than to tell the jury, in substance, that they were only to consider such matters as were shown by the evidence." The supreme court said:

> "The circuit judge who heard these remarks, and was cognizant of the circumstances under which they were made and who was presumably

> acquainted with the intelligence of the jury to whom they were made, and with the ability of counsel for the defendant, who were to follow Mr. Green, to explain to the jury" his contentions, "was in a better position than we are to determine how far he should interfere and rebuke counsel and whether what was said would or not be likely to prejudice the jury against the defendant. * * * Can we say that the trial judge exercised his discretion improperly in not going further than this? If so, what rule shall be laid down for the Government and guidance of *nisi prius* judges in such cases? Looking at it from my standpoint and presuming, as I may (what the circuit court, perhaps, knew), that those who composed the jury were men of ordinary intelligence, and understood the obligations of the oath they had taken, such remarks, if calculated to prejudice them at all, would be more likely to prejudice them against the plaintiff than defendant, because of his counsel having resorted to a line of argument so easily exposed and turned against him."

In the case of *Allen* v. *Autenrieth*, 280 S. W. 79, the court said:

> "It is largely for the trial court to determine the extent to which he shall interfere because of improper argument, and, unless such discretion has been clearly abused, the appellate court will not reverse the judgment for such cause."

In the case of *Asadorian* v. *Sayman*, 282 S. W. 507, the court said:

> "By virtue of his position the trial court was in an infinitely better position than this court to observe the effect of the reference to the result of the former trial upon the jury."

In the case of *Plannett* v. *McFall*, 284 S. W. 850, the court said:

> "Suffice it to say, it is largely for the trial court to determine whether counsel, in the conduct of a case and in argument to the jury, transcend the limits of professional duty and propriety, and, unless there has been a clear abuse of such discretionary power, it is not within the province of an appellate court to interfere."

The plaintiff in error does not contend that the verdict for the plaintiff was excessive, indeed, such question could not be raised under a writ of error. The fact that the plaintiff did not make a motion for new trial upon this ground is impelling proof that the verdict is not excessive even in the opinion of the defendant. So it must be admitted that the verdicts are not excessive, and they are, we contend, for the right parties.

The court in the case of *Brady* v. *Traction Co.*, 140 Mo. App. 421, said in discussing the argument of counsel which they held improper.

> "We conclude that the only proper verdict that could have been rendered was a verdict for plaintiff, and that the damages assessed, * * * are not excessive, and we, therefore, have reached the conclusion in this case, that the remarks of the counsel for plaintiff, improper as they were, did not effect the result."

In the case of *Grand Trunk Ry. Co.* v. *Blay*, 297 Fed. 605, (Second Circuit), the plaintiff in error claimed that counsel for the defendant in error made an improper statement in the presence of the jury concerning an absent witness, to-wit: "that confirms my

theory that the Grand Trunk Railway Company have got her." Counsel for plaintiff in error then said: "I desire an exception to that remark." The court in passing upon this matter said:

> "Counsel for the plaintiff in error did not ask for an instruction to correct the impropriety of this remark. He did not request that the jury be cautioned to be uninfluenced by it, or that they disregard the remark. To make available the impropriety of this remark as an error at the trial, it was incumbent upon counsel for the plaintiff in error to ask for some instruction to the jury to disregard the remark, or be uninfluenced thereby. A mere exception to the remark was insufficient."